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IN THE

Supreme Court of the United States

October Term, 1937

No. 436

BROOKLYN AND QUEENS TRANSIT CORPORATION

Appellant

against

THE CITY OF NEW YORK

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANT

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Opinions Below

The opinion of the Court of Appeals of the State of New York in *New York Rapid Transit Corporation* v. *The City of New York* (*Case No. 435*), which was argued and decided at the same time as the case at bar and on the authority of which the decision in the case at bar was based (R. 56) is reported in 275 N. Y. 258 and 9 N. E. (2d) 858. The memorandum decision of the Court of Appeals of the State of New York in the case at bar (R.

55-56) will be found in 275 N. Y. Mem. The memorandum decision of the Appellate Division of the Supreme Court of the State of New York (R. 54-55) is reported in 251 App. Div. (Mem.) 710. The opinion of the Supreme Court of the State of New York at Special Term in the *New York Rapid Transit Corporation* case (R. 48-52), on the basis of which that court decided the case at bar (R. 2), is not reported.

Jurisdiction

The jurisdiction of this Court is based on § 237 (a) of the Judicial Code as amended (U. S. C., Title 28, §344 (a)). The judgment sought to be reversed was entered on August 9, 1937 (R. 58-59), and was resettled, on motion of the appellee, on August 11, 1937 (R. 60-61). The appeal was allowed on August 24, 1937 (R. 62-63). The judgment sought to be reviewed is the final judgment of the highest court in which decision could have been had.

The Federal question is as to the validity, under the Federal Constitution, of certain Local Laws of the City of New York. This question was raised *in limine* in the complaint (R. 16-20) and was specifically determined in the opinion of the Court of Appeals (Case No. 435, R. 64-67; case No. 436, R. 56).

Questions Presented

1. Whether the challenged Local Laws deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment.

2. Whether said Local Laws deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment.

Outline of the Challenged Local Laws and the Underlying State Enabling Acts

By Ch. 873, Laws of 1934 (R. 23-24), the New York Legislature authorized any city of the State with a population of 1,000,000 or more, from August 18, 1934, to December 31, 1935—

> "to adopt and amend local laws [effective during the period mentioned] imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment. * * *"

including (R. 24) "a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city."

By Ch. 601, Laws of 1935 (R. 25-27) this authority was extended to July 1, 1936.

Both these Acts provided that revenues from the taxes authorized "shall not be credited or deposited in the general fund of any such city but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes *for which* the said taxes[1] have been imposed under the provisions of this Act."

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[1] These enabling Acts, which are set forth in full as exhibits to the complaint (R. 23-27), were substantially identical with Ch. 815, Laws of 1933, by which the State Legislature, for the first time in its history, "conferred upon a municipal corporation authority to enter the field of indirect or excise taxation." *New York Steam Corp.* v. *City of New York*, 268 N. Y. 137, 144; 197 N.E. 172, 174. The original enabling Act was effective only until February 28, 1934, but the power thus delegated to the City was continued until December 31, 1934 by Ch. 302, Laws of 1934, which was in turn followed by the two enabling Acts here involved. Each year since the power so delegated has been extended by a similar Act. Ch. 414, Laws of 1936; cf. Ch. 321, Laws of 1937.

Under the authority thus granted, the Municipal Assembly of the City of New York enacted Local Law No. 21 of 1934 (later amended slightly by Local Law No. 2 of 1935), the title of which reads in part as follows (R. 27):

> "A Local Law *to* relieve the people of the City of New York from the hardships and suffering caused by unemployment * * * *by* imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either Division of the Department of Public Service, and of any and all other utilities doing business within such city, *to* enable such city, to defray the cost of granting unemployment, work and home relief." (Italics ours.)

Section 2 of said Local Law provided (R. 29) that—

> "Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, during the calendar year nineteen hundred thirty-five or any part thereof, *every utility doing business in the city of New York and subject to the supervision of either division of the department of public service,* shall pay * * * an excise tax which shall be equal to three percentum of its gross income for the calendar year nineteen hundred and thirty-five * * *. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law * * *" (Italics ours).

Section 14 thereof, following the legislative mandate, provided (R. 36-37) that revenues resulting from the tax should not be deposited in the City's general fund, but should be deposited in a separate account to be used—

> "exclusively for the purposes of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for that purpose."

By said Local Law the word "utility" was defined to mean (R. 28-29)—

> "any person subject to the supervision of either division of the department of public service and every person whether or not such person is subject to such supervision who shall engage in the business of furnishing or selling to other persons, gas, electricity, steam, water, refrigeration, telephony, and/or telegraphy, * * *",

and the term "gross income" was defined (R. 28), in the broadest possible fashion, to include all receipts of cash, credits or property of any kind, and from whatever source derived, without deduction on account of the cost of property sold, materials used, labor or services or other costs, or any other expense whatsoever.

Any "utility" not subject to the supervision of either division of the Department of Public service was, under said Local Law, subjected to a tax of 3% of "gross operating income," which was broadly defined as including all receipts whatever from the sale of gas, electricity, steam, water, refrigeration, telephony or telegraphy (R. 28, 38).

Local Law No. 21 of 1934, as amended, was followed by Local Law No. 30 of 1935, which is entitled in the same manner as its predecessor, and is substantially in all respects the same except that it imposed the tax for the period from January 1, 1936, to June 30, 1936 (R. 37-47).

The taxes sought to be recovered (aggregating $756,879.50, and covering the year 1935 and the first six months of 1936) were imposed under said two Local Laws.[2]

Statement

This is an appeal from a final judgment of the Supreme Court of the State of New York (R. 58-61), entered pursuant to remittitur of the Court of Appeals, of said State (R. 55-56), dismissing appellant's amended complaint (herein referred to as the complaint) on the ground that it does not state facts sufficient to constitute a cause of action.

Appellant sued in the trial court to recover taxes in the aggregate sum of $756,879.50 exacted from it by the City, the appellee, under purported authority of the Local Laws above described, and paid by it under protest and duress (R. 9-10), on the ground that said Local Laws, as applied to appellant, were repugnant to the Federal Constitution (R. 17-20). The City moved to dismiss the complaint on the ground that it failed to state a cause of action and on the further ground that the court was without jurisdiction (R. 2-3). The Supreme Court, at Special Term, denied the City's motion, holding that the court had jurisdiction of the action, and that upon the allegations of the complaint the Local Laws were invalid

[2] The two Local Laws here involved, which are set forth in full as exhibits to the complaint (R. 27-47), were preceded by Local Law No. 19 of 1933, which imposed a similar "excise tax" (at a lower rate, however) for the period from September 1, 1933, to February 28, 1934. See *New York Steam Corp.* v. *City of New York*, 268 N. Y. 1937; 197 N. E. 172. This was followed by Local Law No. 10 of 1934, effective from March 1, 1934, to December 31, 1934, which was in turn followed by the two Local Laws here attacked. Thereafter the tax was continued by Local Law No. 30 of 1936; cf. Local Law No. 23 of 1937.

as applied to appellant in that they denied to it the equal protection of the law in violation of the Fourteenth Amendment (R. 2, 48-52).

On appeal to the Appellate Division the order entered at Special Term was affirmed without opinion (R. 54-55). Thereafter the Appellate Division granted appellee leave to appeal, and certified to the Court of Appeals the question: "Does the complaint herein state facts sufficient to constitute a cause of action?" (R. 53-54). The Court of Appeals, in an opinion written by Judge FINCH, held that the trial Court had jurisdiction (R. 55-56; Case No. 435, R. 63-64) but it sustained the validity of the challenged enactments, holding that they did not violate the Constitution of the United States and that consequently the complaint did not state facts sufficient to constitute a cause of action (R. 55-56; Case No. 435, R. 64-68). By its remittitur said Court, answering the question certified in the negative, directed that the orders of the lower courts be reversed, and that the complaint be dismissed with costs (R. 55-56).

In addition to the allegations (R. 4-8, 9-10) setting forth the enactment of the two Enabling Acts (p. 3, *supra*) and the challenged Local Laws (pp. 4-5, *supra*) and showing the payment by the appellant, under duress and protest, of taxes imposed by said Local Laws in the amount of $756,879.50, during 1935 and the first half of 1936, the complaint contains allegations in substance as follows:

> The appellant is a street railway corporation organized and existing under the laws of New York and engaged in the operation of a system of street surface railroads in the City of New York. As such, it is subject to the supervision of the Transit Commis-

sion, which is the Metropolitan Division of the Department of Public Service (R. 3-4).

In addition to the 3% excise tax on the gross income of utilities here involved, the City, acting under the same enabling Acts (described at p. 3, *supra*), imposed, effective during 1935 and the first half of 1936, an excise tax on financial businesses of 1/5 of 1% of all gross income in excess of $5,000, and an excise tax on businesses generally (other than utilities and financial businesses) of 1/10 of 1% of all gross receipts in excess of $15,000, derived from business carried on in the City (R. 10-11).

Apart from the aforesaid gross income or gross receipts taxes, the only taxes imposed by the City under said enabling Acts for the purpose of unemployment relief, and effective during the eighteen months' period here involved, were (R. 10-11)—

(a) a general 2% sales tax, payable by the purchaser and applicable to utilities as well as others;

(b) a general 2% tax on certain articles of personal property [in respect of which a sales tax had not been paid], applicable to utilities as well as to others; and

(c) an estate transfer tax [which was repealed after it had been in effect only a few months].

The rate of fare which appellant is permitted to charge for transportation of passengers on the system of railroads operated by it is limited to five cents per passenger, except that in certain instances it may make an additional charge for transfers from one line of the system to another. The City has heretofore refused to permit any increase in the rate of fare (R. 12).

Neither the Transit Commission nor any other commission or body has the power to increase the rate of fare which appellant may charge for

the transportation of passengers, and there is no way, without the consent of the City, in which the appellant can secure the right to increase its rate of fare and no way in which the appellant can or could have passed on to the public any part of the burden of the taxes collected from it by the City under the provisions of said Local Laws, whereas other corporations, both utilities and businesses generally, are in a position to pass on to the public the burden of such taxes as they may be required to pay by increasing their prices for the goods sold or the services furnished by them (R. 12-13).

At the respective times of enactment of the said Local Laws the City itself was operating rapid transit railroads which competed and still do compete directly with the railroads operated by the appellant. Neither division of the Department of Public Service has any supervision over the railroads thus operated by the City, nor was the City required to obtain from either division of the department of Public Service a certificate of convenience and necessity for said railroads before constructing and operating the same. Some of the said railroads run directly parallel to and in the same streets over and along which railroads are operated by the appellant. These new railroads operated by the City directly and seriously compete with the railroads operated by the appellant, causing a substantial loss of income to the appellant, and the appellant has no protection whatever against such competition (R. 13-14).

At the time of the passage of said Local Laws upwards of 10,000 taxicabs were licensed and operated and are still licensed and operating in the City of New York for the transportation of persons for hire on, along and through the streets of the City. Although said taxicabs seriously compete with appellant and deprive it of substantial rev-

enues which it would otherwise receive, their operation has never been subject to the supervision of either division of the Department of Public Service and the appellant has no protection against such competition (R. 14).

Because of inherent differences in the character of the respective businesses (R. 20), the operating and maintenance expenses of railroad corporations (including the appellant) engaged in the operation of subway, elevated or street surface railroads in the City of New York are far higher in proportion to gross receipts than those of other types of businesses within the taxed class and subject to said Local Laws. Moreover, the ratio of net income to gross receipts is far higher in the case of corporations selling gas, electricity, refrigeration, steam, water, telephone service or telegraph service than in the case of appellant or any other street railroad included within the taxed class. As an illustration, the net income for 1935 of Brooklyn-Edison Company, a corporation selling electricity in the City of New York and subject to supervision by the Department of Public Service was, before deduction of taxes, about 42% of its gross receipts for said year, whereas appellant's net income for that year, before deduction of taxes, was about 14½% of its gross receipts. Other street railroad corporations doing business in the City, while having substantial gross receipts, were operated at a loss and had no net income, so that the taxes imposed by the Local Laws in question simply added to their deficits (R. 15-16).

Appellant is not engaged in any of the utility businesses specifically mentioned in the challenged Local Laws (see p. 5, *supra*), and was subjected to the tax imposed thereby solely because, being a common carrier engaged in the operation of rapid transit railroads in the City of New York, it is sub-

ject to the supervision of the Transit Commission, one of the two divisions of the Department of Public Service (R. 3-4, 6, 28, 38).

In addition to the tax here challenged, appellant is required by the New York Tax Law to pay to the State of New York an annual franchise tax "for the privilege of exercising its corporate franchise or holding property," and an additional franchise tax "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity." Moreover, appellant is required to pay annually to the City a special franchise tax on the value of its property and its special franchises to use the streets of the City for the operation of its railroads (R. 10, 11-12).

The said Local Laws are unconstitutional, null and void for the following, among other, reasons (R. 16-20):

1. They deprive the appellant and others of property without due process of law in that—

(a) The challenged taxes are measured by a percentage of gross income without regard to the net income of or the ruinous effect upon the persons and corporations purported to be taxed (R. 17).

(b) The persons and corporations purported to be taxed are required to pay the shares of others in the expense of a project which is of equal concern to all and which is no more related to the particular class which is taxed than to business in general (R. 18).

2. They deny to the appellant and other corporations the equal protection of the law in that—

(a) Though purporting to impose only emergency taxes for the special purpose of un-

employment relief, they arbitrarily single out one small group and tax that group upon the privilege of holding property and doing business within the City of New York at a rate which is 3000% higher than the rate at which businesses generally are taxed for the same purpose, thereby arbitrarily and with hostile design placing a ruinous burden upon a particular group of persons and corporations in an attempt to make them pay far more than their fair share of the cost of emergency relief, there being no sound or reasonable basis for the discrimination against them (R. 18).

(b) The definition of the word "utility" contained in the Local Laws is such as to make the classification unreasonable and void because, except as to the business of furnishing or selling gas, electricity, steam, water, refrigeration, telephone service or telegraph service, the character of the business in which any person or corporation may be engaged is not made the test of whether or not such person or corporation is within the taxable class, but the sole test thereof is whether or not such person or corporation is subject to the supervision of either division of the Department of Public Service, regardless of the character of his or its business (R. 19).

(c) Even if there be any reasonable basis for taxing other utilities more heavily than general businesses for the special purpose of unemployment relief, there is certainly no reasonable basis for taxing the appellant and other street railroads more heavily than business in general for that purpose, and it is wholly unreasonable to include the appellant in the same class with gas, electric, telephone and other

utility corporations because whereas the latter meet with little or no competition and can protect themselves from the ruination which might otherwise result from excessive taxation by obtaining higher rates for the utility service furnished by them, the appellant meets with substantial competition not only from taxicabs, but from the operation of new underground railroads by the City of New York, the taxing authority itself, and, being helpless to obtain any increase in the rate of fare which it may charge its passengers, it has no way of defending itself against confiscation and ruination resulting from excessive taxation (R. 19-20); and

(d) The said Local Laws impose a tax measured by a percentage of gross receipts upon a class defined in such a way as to include corporations, the respective businesses of which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, the result of which is that said Local Laws produce glaring inequality in the distribution of the tax burden within the taxed class itself, arbitrarily discriminating in favor of some and against other members of the class and taxing some far more heavily than others on the value of the privilege taxed (R. 20).

Specification of Errors

The appellant urges all of the assigned errors set forth in the Record (R. 67-70), which may be summarized as follows:

The Court of Appeals erred—

(1) In holding that the challenged Local Laws do not deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment (R. 67-69).

(2) In holding that said Local Laws do not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment (R. 70).

Summary of Argument

The appellant contends that the challenged Local Laws deny to appellant the equal protection of the law and deprive it of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States for the reasons, (1) that, as to all utilities, the classification whereby they are taxed for the particular purpose of unemployment relief at a rate more than 3000% higher than that at which other businesses are taxed for the same purpose is without any rational basis and constitutes arbitrary and hostile discrimination against a particular class; (2) that the classification is particularly arbitrary and hostile as to the appellant and other street railroad companies operating in New York City because they do not have the advantages over businesses generally which are enjoyed by other types of utilities and are in an even poorer position than ordinary businesses to pay such a heavy tax, being wholly unable to offset such tax through an increase in the rate of fare which they may charge, and (3) that a tax measured by a percentage of gross income and applied to a class which includes street railroad companies along with gas, electric, telephone and

other utility companies results in gross inequalities in the distribution of the tax burden among the members of the taxed class itself due to the fact that, by reason of essential differences in the character of the respective businesses, street railroad companies, including appellant, operate at a far lower ratio of profit than other types of utilities, so that the tax takes a far larger percentage of their net income than of the net income of other utilities, and since the tax is imposed on the privilege of doing business, and since the value of such privilege is determined not by gross receipts but by the net profit which can be derived from the exercise thereof, street railroads are taxed far more heavily on the value of the privilege taxed than are other utilities.

ARGUMENT

This is a companion case to *New York Rapid Transit Corporation* v. *The City of New York,* No. 435, present Term, which is being argued simultaneously herewith. The two cases were begun at the same time and, the City having made identical motions to dismiss in both cases (No. 435, R. 2-3; No. 436, R. 2-3), were argued together in the State courts, this case having been decided by all three State courts on the basis of their respective decisions in the *New York Rapid Transit Corporation* case (No. 436, R. 2, 48-52, 54, 55-56).

The issues in the two cases are identical, so far as the appeals in this Court are concerned, except that the contention made by New York Rapid Transit Corporation, in case No. 435, to the effect that the challenged Local Laws impair the obligation of the contract between that appellant and the City, known as Contract No. 4, in violation of Section 10 of Article I of the Federal Consti-

tution, is not available to Brooklyn and Queens Transit Corporation, the appellant in the present case, since Brooklyn and Queens Transit Corporation does not operate under Contract No. 4 but under street railroad franchises from the City.

Since the facts alleged in the amended complaint herein (No. 436, R. 3-22) are in substance identical with those set forth in the amended complaint in the *New York Rapid Transit Corporation* case (No. 435, R. 3-28), save as the latter complaint relates to Contract No. 4, and since every argument made on behalf of New York Rapid Transit Corporation in case No. 435 is available to Brooklyn and Queens Transit Corporation in the present case (save, of course, the contention of New York Rapid Transit Corporation that the Local Laws in question impair the obligation of Contract No. 4)[3], the appellant in the present case, in order to avoid unnecessary duplication, hereby adopts as the argument in support of its contentions on this appeal, and hereby incorporates herein by reference, the arguments set forth under Points I and II (pp. 17-60) in the brief of New York Rapid Transit Corporation in case No. 435.

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[3] One of the arguments advanced in the appellant's brief in the *New York Rapid Transit Corporation* case (pp. 35-44) is that the challenged tax is arbitrary and discriminatory as to said appellant because, among other reasons, said appellant is limited by Contract No. 4 to a five cent fare, and therefore, unlike other types of utilities subject to the tax, is unable, by means of an offsetting increase in its rate of fare, either to avoid confiscation resulting from excessive taxation or to pass on to the public some part, at least, of the burden of the tax. While that argument is equally available to Brooklyn and Queens Transit Corporation in this case (see No. 436, R. 12-13), it should perhaps be pointed out that the restriction on the rate of fare which this appellant may charge does not arise by reason of a contract with the City such as Contract No. 4 but by reason of rate provisions in this appellant's franchises which are beyond the regulatory power of the Transit Commission (see Record in No. 436, R. 12-13; see also cases in the New York Rapid Transit Corporation brief, pp. 36-37).

CONCLUSION

The allegations of the complaint show that the challenged Local Laws violate the appellant's constitutional rights and accordingly the complaint states facts sufficient to constitute a cause of action. The judgment appealed from should be reversed.

Respectfully submitted,

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January, 1938.